ABDOL MULOK AWANG DAMIT

v.

PERDANA INDUSTRI HOLDINGS BHD

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOFF JCA
RICHARD MALANJUM JCA
[APPEAL NO: W-02-376-1999]
31 MAY 2003

CIVIL PROCEDURE: *Summary judgment - Appeal against - Triable issues - What amounts to - Bare assertions - Duty of judge - Current judicial trend*

This was a straightforward appeal from the decision of the judge-in-chambers upholding the decision of the senior assistant registrar in allowing the plaintiff to enter final judgment against the defendant under O. 14 Rules of the High Court 1980 ('RHC').

Held:
Per Richard Malanjum JCA

[1] The issue of illegality was not put before the judge below; neither was it alluded to in the statement of defence nor in the defendant's affidavit in opposition. This was not a case in which it had been shown that the transaction in question was *ex facie* illegal such that the court should not enforce it. On the other hand, the defendant's allegations were merely bare assertions; the documentary evidence and the subsequent conduct of the defendant were all inconsistent with his claim that there was a collateral agreement binding upon the plaintiff. The facts of the case showed that the plaintiff did not make such representations as would give rise to a collateral agreement. (pp 501 e-h, 502 a-g & 503 a-b)

[2] The defendant's bare assertions simply did not add up to triable issues that would necessitate a full trial. (pp 503 c-g & 504 a-d)

[Defendant's appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Rayuan ini merupakan satu rayuan terhadap keputusan hakim dalam kamar yang mengesahkan keputusan penolong kanan pendaftar yang membenarkan plaintif memasukkan penghakiman muktamad terhadap defendan dibawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('RHC').

Diputuskan:
Oleh Richard Malanjum HMR

[1] Isu kepenyalahan undang-undang tidak dikemukakan kepada hakim dibawah; ianya juga tidak disebut di dalam pernyataan pembelaan ataupun didalam afidavit balasan defendan. Ini bukannya kes yang menunjukkan bahawa transaksi yang dipersoalkan itu merupakan sesuatu yang *ex facie* menyalahi undang-undang dan mahkamah tidak wajar menguatkuasakannya. Sebaliknya, penuduhan-penuduhan defendan hanyalah merupakan penuntutan-penuntutan semata; keterangan dokumentar dan perlakuan defendan kemudiannya semuanya tidak selaras dengan tuntutan beliau yang menyatakan bahawa terdapat satu perjanjian kolateral yang mengikat plaintif. Fakta-fakta kes menunjukkan bahawa plaintif tidak membuat representasi yang boleh membangkitkan satu perjanjian kolateral.

[2] Penuntutan semata defendan tidak menjadikan ia isu-isu bicara yang memerlukan perbicaraan penuh.

Rayuan defendan ditolak.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(foll)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 2 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***

Seven Seas Supply Co v. Rajoo [1966] 1 MLJ 71 ***(refd)***

Tan Cheng Hock v. Chan Thean Soo [1987] 2 MLJ 479 ***(refd)***

Teh Eok Kee & Anor v. Tan Chiah Hock & Anor [1996] 2 CLJ 227 FC ***(refd)***

Thangaulu v. Saudagar Singh [1965] 1 MLJ 38 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 8(1)

For the appellant/defendant - Rakhbir Singh (Jagdish Kaur); M/s Rakhbir Singh & Co
For the respondent/plaintiff - Joseph Yeo; M/s Joseph Yeo

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-1046-1997]

Reported by Gan Peng Chiang

JUDGMENT

Richard Malanjum JCA:
On 10 February 2003 we dismissed the appeal of the appellant/defendant ('appellant') against the decision of the High Court allowing the application of the respondent/plaintiff ('respondent') to enter final judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC).

In coming to our decision we indicated that we would give our reasons later. We do so now.

In its statement of claim the respondent prayed for the following:

i. the sum of RM2,929,452.05;

ii. interest at the rate of 15% per annum on the sum of RM2,500,000 from 17 September 1997 to date of full payment;

iii. costs;

iv. such other order or relief as deemed fit.

The appellant filed his defence on 20 February 1998 denying any liability and asserted that the purported agreement was a sham and thus the respondent should be estopped from relying on it. And the appellant averred, *inter alia*, that he did not obtain the advance for himself but only as a conduit for the respondent in its quest to ensure the increase in the cash flow of a company called the Labuan Securities Sdn. Bhd. ('the company') in which the respondent had 28.78% equity interest. It was further asserted by the appellant that the respondent went through him because he was a director of the company and that in turn the said sum given by the respondent became part of the RM5,000,000 he had lent to the said company.

And by way of summons in chambers dated 12 February 1998 supported by an affidavit of Koay Seng Lee affirmed on 9 February 1998 ('Koay's first affidavit') the respondent applied for summary judgment.

The appellant opposed the application and filed his affidavit in opposition affirmed on 26 February 1998 ('appellant's first affidavit').

The appellant's first affidavit was replied to by an affidavit of Koay Seng Lee affirmed on 28 March 1998 ('Koay's second affidavit').

Briefly it was the assertion of the respondent that at the request of the appellant it advanced the sum of RM2,500,000 to him. And such transaction was reduced in writing *vide* an agreement dated 25 July 1996 ('the agreement') containing the terms of the advance.

In opposing the application the appellant referred to his defence filed and relied on the defences pleaded thereto. And he elaborated that the request for assistance was made by the then Chief Executive Officer of the respondent, Mr. Yip Yee Foo ('Yip'). According to the appellant it was Yip who came up with the idea of a loan agreement for the appellant to sign being part of the scheme to increase the cash flow of the company.

The appellant also referred to a document, Unsecured Subordinated Term Loan Agreement, which he claimed to have entered into with the company in respect of a loan of RM5,000,000 to the latter and in which the RM2,500,000 purported advance from the respondent became part of it.

As regards a letter which he signed pertaining to the alleged advance the appellant explained that it was at the behest of Yip and was made in order to help the respondent to explain to the Securities Commission concerning the said advance.

In reply to the assertions of the appellant the respondent through Kaoy's second affidavit stated that it had no knowledge of them and that Yip no longer worked for the respondent.

Hearing of the summons in chambers came before the senior assistant registrar who gave judgment for the respondent on 27 May 1998. Subsequently the appellant appealed to the judge in chambers who heard the appeal and affirmed the decision of the senior assistant registrar.

In his grounds of judgment the learned judge in the court below dealt with the three issues which he said were raised by the appellant, namely:

(a) that there were representations made by Yip;

(b) that those representations were binding on the respondent; and

(c) that the respondent is estopped from enforcing the agreement for the repayment of the sum advanced.

And in dismissing the appeal the learned judge found that there were no representations made since the appellant failed to produce any evidence of such assertions and hence there was no question of binding collateral agreement. The learned judge also found that the agreement was binding and enforceable since the appellant even admitted liability *vide* a letter dated 16 October 1996.

Before us learned counsel for the appellant at the outset submitted that the transaction was caught by the Money Lenders Act 1951 ('the Act') in view of the element of interest imposed under the agreement. And according to learned counsel the respondent was not a licensed money lender at all material times. In short the advance made to the appellant was in breach of the Act and hence illegal. The other points raised were on those that were put before the judge in the court below and submitted that they were triable issues. Learned counsel for the appellant also submitted that the judge in the court below erred in insisting that the bare assertion of the appellant was not sufficient.

We deal first on the initial point raised. We declined to allow learned counsel for the appellant to dwell on the point bearing in mind O. 18 r. 8(1) of RHC. We also noted that the issue of illegality of the transaction was not put before the learned judge in the court below. And neither was the same alluded to in the statement of defence nor in the affidavit in opposition filed by the appellant. We were well aware of the settled principle that a party may raise a point on illegality even at an appeal stage. (See: *Thangaulu v. Saudagar Singh* [1965] 1 MLJ 38). However in the instant case it was not shown in any fashion that the transaction in question was *ex facie* illegal as to warrant the court not to enforce it. There was nothing in the agreement stipulating interest chargeable. Only funding costs. (See: *Seven Seas Supply Co. v. Rajoo* [1966] 1 MLJ 71; *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 2 CLJ 1667; [1992] 1 CLJ (Rep) 173).

In respect of the assertion by the appellant that there were representations made by Yip, we were inclined to agree with the learned judge in the court below that it was only a bare assertion. Indeed the appellant did not explain for his failure to respond to the demand letter dated 16 September 1997 (exh. P5 of Koay's first affidavit) at the first opportunity available. (See: *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 4 CLJ 155; *Tan Cheng Hock v. Chan*

Thean Soo [1987] 2 MLJ 479 at p. 487). And such failure seems to reconcile with the fact that by a letter dated 16 October 1996 (exh. P3 of Koay's first affidavit) the appellant gave his undertaking to repay the advance taken. No doubt the appellant gave his explanation in his affidavit for giving the said undertaking. But surely he could have come up with that much earlier or at least a follow up to that undertaking when the demand came up. None of these took place. And there was no assertion that the appellant was then a mere country yokel. On the contrary he was the Executive Chairman of the company with shares valued in millions of ringgit. (See: *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227).

Learned counsel for the appellant relied on the fact that the respondent failed to deny or dispute the assertion by the appellant of an existence of representations by the said Yip and thus should be deemed to have admitted it as true. That of course is in accordance with the settled principle of law. (See: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82).

However in the instant case it was not that the respondent did not dispute the assertion. What the respondent did was to say that it had no knowledge of such assertion since Yip was no longer in its employment. In our view such a stand should be sufficient to answer the assertion given the fact that Yip had left the employment with no trace of documentary evidence left for such representations having been made. It might have been a different situation if Yip had deposed to such a fact for the appellant.

Thus given the facts and circumstances of this instant case and based on the documentary evidence available and the subsequent conduct of the appellant we do think that the conclusion of the learned judge in the court below, namely, that there was no representations as alleged, could be considered as unreasonable. And with such conclusion the argument that a binding collateral agreement existed should equally fail.

The next contention of learned counsel for the appellant was that the respondent should be estopped from enforcing the agreement. This of course was made on the basis that the earlier contentions were true. However in affirming the conclusions of the learned judge in the court below this issue would also fail.

It was the gist of the contention of learned counsel for the appellant that the agreement was a sham in view of the arrangement made with the respondent through Yip. With respect we were not impressed with the argument in view of the fact that we were not convinced that there existed representations made by the respondent through Yip. And we would repeat our reasons as given for the earlier contentions to conclude that the agreement could not have been a sham. If it was then surely there should have been contemporaneous document or documents to reflect such an arrangement. In this case there was nothing at all except for the bare assertion by the appellant. And we agree with the learned judge in the court below that the letter of undertaking to repay the advance was crucial in that it indicated the clear intention of the appellant at that point in time.

It was the contention of learned counsel for the appellant that since it was only an O. 14 application all that was required of the appellant was to raise triable issues and that he should not be expected to come up with proofs as ruled by the learned judge in the court below. With respect such a submission is not entirely consistent with our current judicial trend. Bare assertion does not necessarily amount to a triable issue thereby compelling a case to go for a full trial. It may still be subject to curial scrutiny for its value. Indeed in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 his Lordship Mohd. Azmi FCJ gave a clear guide on the approach to be adopted when he said this at p. 631 (p. 19):

> In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of-whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* 5 had this to say at p. 217:
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> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* 6 and *European Asian Bank AG v. Punjab & Sind Bank* 7 at p. 516.)

Accordingly none of the alleged issues raised above as well as the other issues which may not have been specifically dealt with in this judgment can be considered as amounting to triable issues.

We therefore affirmed the decision of the judge in the court below and dismiss this appeal of the appellant with costs to be taxed. Deposit to be paid to the respondent towards the account of taxed costs.